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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. TONY BEJARANO, Defendant and Appellant.	B219306 (Los Angeles County Super. Ct. No. NA079535)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joan Comparet-Cassani, Judge. Affirmed.

Cheryl Barnes Johnson, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Scott A. Taryle and Stephanie A. Miyoshi, Deputy Attorneys General, for Plaintiff and Respondent.

The jury found defendant Tony Bejarano guilty of evading an officer (Veh. Code, § 2800.2, subd. (a)), resisting an executive officer (Pen. Code, § 69), driving under the influence of alcohol (Veh. Code, § 23152, subd. (a)), and driving with a blood alcohol level of .08 percent or higher (Veh. Code, § 23152, subd. (b)). In a separate proceeding, the trial court found true the recidivist allegations, including two prior prison terms (Pen. Code, § 667.5**,** subd. (b)) and one prior serious felony conviction under the three strikes law (Pen. Code, §§ 1170.12, subds. (a)–(d), 667, subds. (b)–(i)). The court imposed a prison term of nine years ten months. Subsequently, defendant's strike prior conviction was ruled unconstitutional and set aside. Defendant was resentenced to a term of six years two months.[1]

In this timely appeal, defendant contends substantial evidence does not support the conviction of evading an officer, it was an abuse of discretion to deny defendant's request to substitute new private counsel, and the trial court erred in sentencing him to the full consecutive term for misdemeanor driving with a blood alcohol level of .08 percent or more. We affirm the judgment.

STATEMENT OF FACTS

Prosecution Case

Late in the evening of September 1, 2008, defendant was driving northbound on Alamitos at a high, accelerating rate of speed when he suddenly drove into the southbound lane and nearly collided with two Long Beach police officers who were on patrol in an unmarked patrol vehicle. The officers made a U-turn and followed defendant. Defendant

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[1] Defendant was sentenced to three years in prison (the upper term) for evading an officer, with an enhancement of two years for the prior prison terms; eight months in prison (one-third of the upper term) for resisting an executive officer; six months in county jail, stayed, for driving under the influence; and six months for driving while having a 0.08 percent or higher blood alcohol level.

did not stop for a red light. The officers activated their lights and siren in an attempt to conduct a traffic stop. Defendant did not stop. Defendant accelerated at a high rate of speed with the police officers in pursuit. Defendant failed to stop at two stop signs. Traveling at 80 miles an hour in a 25-mile per hour zone, defendant failed to stop at a third stop sign. Driving at 50 to 60 miles an hour without stopping at a fourth stop sign, defendant lost control of his vehicle and hit a concrete pole and two signs. The officers ordered defendant to get out of his car. Defendant backed his car into the patrol car, nearly hitting the officers, and drove away. The officers resumed pursuit with their lights and sirens on, but defendant did not pull over. Defendant traveled in oncoming lanes. Defendant turned off his vehicle lights in an attempt to evade detection and failed to stop at another red light. Defendant drove into a parking lot and attempted to flee on foot. Defendant disregarded the officers' orders to stop and tried to fight them off before he surrendered and was taken into custody. The amount of ethanol found in defendant's blood was .128 percent.

Defense Case

A resident of the neighborhood where defendant was apprehended testified the police used excessive force to subdue defendant.

DISCUSSION

Evading an Officer

Defendant contends the evidence is insufficient to support his conviction of evading an officer in violation of Vehicle Code, section 2800.2, subdivision (a), because there was no evidence the pursuing officers' vehicle was "distinctively marked," as required by Vehicle Code, section 2800.1, subdivision (a)(3). We conclude substantial evidence supports the conviction.

"'In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Story* (2009) 45 Cal.4th 1282, 1296.)

a. Applicable Law

"Section 2800.2 [of the Vehicle Code] makes it a crime for a motorist to flee from, or attempt to elude, a pursuing peace officer's vehicle in 'violation of Section 2800.1' and 'in a willful or wanton disregard for the safety of persons or property.' Under section 2800.1, a person who operates a motor vehicle 'with the intent to evade, willfully flees or otherwise attempts to elude a pursuing peace officer's motor vehicle, is guilty of a misdemeanor . . . *if all of the following conditions exist*: [¶] (1) The peace officer's motor vehicle is exhibiting at least one lighted red lamp visible from the front and the person either sees or reasonably should have seen the lamp. [¶] (2) The peace officer's motor vehicle is sounding a siren as may be reasonably necessary. [¶] (3) *The peace officer's motor vehicle is distinctively marked*. [¶] (4) The peace officer's motor vehicle is operated by a peace officer . . . wearing a distinctive uniform.' (Italics added.) Thus, the statute requires four distinct elements, each of which must be present: (1) a red light, (2) a siren, (3) a distinctively marked vehicle, and (4) a peace officer in a distinctive uniform." (*People v. Hudson* (2006) 38 Cal.4th 1002, 1007-1008.) "[A] trial court must tell the jury that in determining whether the statutory requirement that the pursuing police officer's vehicle be distinctively marked is met, it should consider the physical features of the vehicle itself that distinguish it from vehicles not used for law enforcement. To be distinctively marked, a vehicle must have, in addition to a red light and siren, one or more distinguishing physical features that are reasonably visible to other drivers during the pursuit. A trial court, however, need not instruct the jury that any particular form or

specific type of mark is necessary."[2] (*Id.* at p. 1013.) A blue amber light blinking in the back of an unmarked police vehicle might be a distinctive mark if reasonably visible to other vehicles. (*Id.* at pp. 1006, 1014.)

b. Relevant Facts

The officers' unmarked patrol vehicle was a dual purpose police vehicle, which was the same as a regular black and white patrol vehicle, except the dual purpose vehicle was tan in color. In addition to a siren, the vehicle had two lights on the front grill that were red and blue, red and blue flashers on each side of the side mirrors, a forward facing red light with a flashing blue light, two strobes on the license plates that flash red and blue, and red and blue lights on the rear. Traffic stops are conducted with this type of vehicle. When all the lights are activated, they alternate red and blue, including the headlights. All the lights are activated when the officers conduct a traffic stop, so that there is no mistake that a police vehicle is behind the car being stopped.

Shortly after defendant ran through the first red light, the officers activated their lights and siren in an attempt to conduct a traffic stop. The lights and siren were on when defendant went past the third stop sign that he did not heed. All lights were flashing when the officers stopped behind defendant at the concrete pole. The patrol car's red and blue lights were on when defendant finally stopped in the parking lot.

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[2] The jury was instructed in the language of CALJIC No. 12.87: "A vehicle operated by a peace officer is 'distinctively marked' if its outward appearance during the pursuit exhibits, in addition to a red light and a siren, one or more features that are reasonably visible to other drivers and distinguish it from vehicles not used for law enforcement so as to give reasonable notice to the person being pursued that the pursuit is by the police. However, no particular form or specific type of mark, insignia or log is necessary." Defense counsel agreed this instruction should be given.

c. Analysis

The evidence is undisputed that the vehicle's numerous blue flashing lights were activated when the officers attempted to conduct the traffic stop. Defendant challenges none of this evidence. The jury was correctly instructed on the definition of "distinctively marked." It is reasonable to infer that the jury found the flashing blue lights were visible to defendant when the officers chased him. Accordingly, substantial evidence supports the finding the officers' vehicle was distinctively marked within the meaning of Vehicle Code, section 2800.1, subd. (a)(3).

Substitution of Counsel

Defendant contends it was an abuse of discretion to deny his request to discharge privately retained counsel Robert Ramirez and replace him with privately retained counsel Matthew Kaestner. We disagree with the contention.

Denial of a motion to substitute retained counsel is reviewed for abuse of discretion. (*People v. Verdugo* (2010) 50 Cal.4th 263, 311.) "A trial court abuses its discretion when its ruling 'fall[s] "outside the bounds of reason."' [Citations.]" (*People v. Waidla* (2000) 22 Cal.4th 690, 714.)

a. Applicable Law

"The right to retained counsel of choice is—subject to certain limitations—guaranteed under the Sixth Amendment to the federal Constitution. [Citations.] In California, this right 'reflects not only a defendant's choice of a particular attorney, but also his decision to discharge an attorney whom he hired but no longer wishes to retain.' (*People v. Ortiz* (1990) 51 Cal.3d 975, 983[.]) The right to discharge a retained attorney is, however, not absolute. ([*Ibid*].) The trial court has discretion to 'deny such a motion if discharge will result in "significant prejudice" to the defendant [citation], or if it is not

timely, i.e., if it will result in "disruption of the orderly processes of justice" [citations].' (*Ibid.*; see *United States v. Gonzalez-Lopez* [(2006) 548 U.S. 140,] 152 [a trial court has 'wide latitude in balancing the right to counsel of choice against the needs of fairness' and 'against the demands of its calendar'].)" (*People v. Verdugo*, *supra*, 50 Cal.4th at pp. 310-311.) The right to secure counsel of choice is limited by the state's "'"'interest in proceeding with prosecutions on an orderly and expeditious basis, taking into account the practical difficulties of 'assembling the witnesses, lawyers, and jurors at the same place at the same time.'"'" [Citations.]" (*People v. Keshishian* (2008) 162 Cal.App.4th 425, 428.)

b. Relevant Facts and Procedure

Defendant was represented by privately retained counsel Reynaldo Ochoa at his arraignment on October 17, 2008. On November 24, 2008, Attorney Ochoa was relieved, and a deputy public defender was appointed to represent defendant. On January 7, 2009, the deputy public defender was relieved, and privately retained Attorney Ramirez was substituted in to represent defendant. The substitution entailed a delay of the trial.

On June 30, 2009, the case was called for trial by jury, a jury panel was summoned to the courtroom, and Attorney Ramirez announced he was ready for trial. Attorney Kaestner, who had been retained by defendant's family to handle a motion, asked the trial court to speak on defendant's behalf to request a continuance regarding the prior conviction. The court denied the request "under *People v.* [*Keshishian*]. [¶] . . . [¶] . . . You are not counsel of record, 162 Cal.App.4th 425. This would disrupt the orderly administration of justice. We have a panel waiting that we've already called in. This is the day of trial, and I find this to be a ploy in order to disrupt the proceeding. [¶] Your appearance is not accepted. Your request to sub in is denied. You have no standing, period." Thereupon, Attorney Kaestner spoke with defendant and defendant asked for a "Marsden hearing."[3] At the hearing, defendant complained Attorney Ramirez did not file

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[3] *People v. Marsden* (1970) 2 Cal.3d 118.

a motion to dismiss the strike prior and defendant no longer wanted Attorney Ramirez to represent him. The court denied the motion as untimely and a "ploy to delay the trial[,]" and ordered the trial to begin.

c. Analysis

Defendant contends there was no showing of significant prejudice to the trial court's orderly proceedings. The contention is meritless. The substitution request was made on the day of trial. The jury panel had been called in. Both sides were ready for trial that day, and one of the police officers was present to testify. It is reasonable to infer from the fact Attorney Kaestner had only been retained to request a continuance of the trial and to file a motion to strike the strike prior that Attorney Kaestner was not ready to go to trial. Thus, substitution would have meant the trial could not go forward that day. The court planned its calendar and called in a jury panel with the expectation the matter would go to trial that day. Postponement would leave a void in the court's calendar during which the court could not be productively engaged in conducting trials. Based on this showing of prejudice to the court's orderly proceedings, denial of the substitution request was a proper exercise of discretion.

Defendant further contends a *Marsden* hearing was an improper vehicle for determining whether his substitution request should be granted.[4] On this record, we have no doubt the trial court applied the correct standard for determining the motion. The court cited *People v. Keshishian*, which correctly sets forth the standard for ruling on a motion to substitute retained counsel. Noting this was the day of trial and a jury panel

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[4] Under *People v. Marsden*, *supra*, when a defendant requests to substitute one court-appointed counsel for another, he "must make a sufficient showing that denial of substitution would substantially impair his constitutional right to the assistance of counsel[,] whether because of his attorney's incompetence or lack of diligence[,] or because of an irreconcilable conflict[.]" (*People v. Ortiz*, *supra*, 51 Cal.3d at p. 980, fn. 1.)

had been called in, the court made findings the motion was untimely and granting the motion would "disrupt the orderly administration of justice" and cause delay.

Sentence for Conviction of Driving While Having .08 Percent or Higher Blood Alcohol

Defendant contends the trial court erred in sentencing him to the full consecutive term of six months for driving while having .08 percent or higher blood alcohol level in violation of Vehicle Code, section 23152, subdivision (b), a misdemeanor. (See Veh. Code, § 23152, subd. (b); Pen. Code, § 17, subd. (a).) We disagree.

Penal Code section 1170.1, subdivision (a) provides in pertinent part: "Except as otherwise provided by law, and subject to Section 654, when any person is convicted of two or more felonies, . . . and a consecutive term of imprisonment is imposed under Sections 669 and 1170, the aggregate term of imprisonment for all these convictions shall be the sum of the principal term, the subordinate term, and any additional term imposed for applicable enhancements for prior convictions, prior prison terms, and Section 12022.1. The principal term shall consist of the greatest term of imprisonment imposed by the court for any of the crimes, including any term imposed for applicable specific enhancements. The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed, and shall include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses."

"[T]he Legislature clearly indicated its intent that the aggregation provisions of Penal Code section 1170.1, which limit consecutive terms to one-third of the middle determinate term, apply only in imposing sentence for felonies[.]" (*In re Eric J.* (1979) 25 Cal.3d 522, 537 [distinguishing the Legislature's intent in sentencing of minors]; accord, *People v. Erdelen* (1996) 46 Cal.App.4th 86, 91-92.)

As Vehicle Code section 23152, subdivision (b), is a misdemeanor, the aggregation provisions of Penal Code section 1170.1, subdivision (a), which limit consecutive terms for felonies to one-third of the middle determinate term, do not apply. (See *In re Eric J.*, *supra*, 25 Cal.3d at p. 537.) The trial court did not err in sentencing defendant to the full consecutive term.

DISPOSITION

The judgment is affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.